

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KIM E. BRUNDIGE)	
Claimant)	
)	
VS.)	
)	
INTEGRATED SOLUTIONS GROUP)	
Respondent)	Docket No. 1,024,260
)	
AND)	
)	
COLUMBIA NATIONAL INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the August 24, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

ISSUES

The ALJ found that claimant failed to sustain his burden of proving an accidental injury arising out of employment with respondent and therefore denied claimant's preliminary hearing requests.

The claimant appeals this finding and argues that "[a]lthough the manifestation of force was slight, it is clear that the activity of bending over in a slight position while typing caused his [claimant's] back to pop."¹ Claimant also argues that there was a work-related risk involved in performing this slightly strenuous work activity, and that the specific act of bending while typing led to a herniated disk and the onset of radicular type symptoms as of April 19, 2005. Accordingly, the clamant is requesting that the ALJ's decision be reversed and he be awarded temporary total disability payments from May 20, 2005 until

¹ Claimant's Brief at 2 (filed Sept. 14, 2005).

released, that any outstanding medical bills and medical mileage be paid and that Dr. Abay be designated as the authorized treating physician.²

Respondent has not filed a brief, but would presumably ask the Board to affirm the ALJ's preliminary hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a dispatcher. In addition to dispatching technicians on service calls, he also manufactured cables on a work bench and occasionally handled incoming freight. Claimant testified that the job involved a lot of repetitive motion and some lifting which he was careful to keep under 40-50 pounds.³

In 2002, claimant experienced low back problems and, on February 26, 2003, had undergone surgery. Claimant felt like he was doing well since the surgery and had no complaints. Nor did he ever have any problems with radiating pain into his lower extremities. Then on April 19, 2005, claimant was performing his normal work duties when, at approximately 8:10 a.m., he felt a distinct pop and sharp pain in his low back that went down his right leg. This event apparently happened while claimant was sitting in his regular work chair while he was typing. When asked if he could recall if something happened while he was sitting in the chair, he responded "I can't recall."⁴ His lawyer then asked him the following questions:

Q. Some of the medical records that have been offered today reflect that you were twisting when you felt the pop?

A. Very well could be.

Q. Do you have any recollection of the specific action you were doing at the time of the injury?

A. I know I was typing immediately beforehand. I could have turned to answer a technician's question, pick something up. I cannot recall exactly.

Q. While you were seated in the chair, though, you did feel a sudden onset of pain?

A. Yes.

Q. And you heard a pop, or felt a pop?

A. I felt a pop.⁵

² Claimant's Brief at 3 (filed Sept. 14, 2005).

³ P.H. Trans. at 12.

⁴ *Id.* at 16.

⁵ *Id.* at 16-17.

Claimant maintains the chair in which he was sitting was defective and would periodically drop at any time and the back rest would unexpectedly shift. He testified that he told his employer of this problem, and that he was sitting in this chair on April 19, 2005. However, claimant also testified that when he sat down in his chair to work that morning, the chair did not drop and that he experienced no back or leg problems when he sat in the chair on the morning of April 19, 2005. Claimant also testified that he was in a slightly bent position while typing and that while in that position, he sustained the injury he describes.

Ten minutes after the onset of his pain claimant informed Lee Miller, whose position or title is not disclosed in the record, of his injury. Mr. Miller told him to go ahead and go home. At that point claimant experienced right leg pain that ran down toward his right knee. He also experienced tingling and numbness down through the toes. This was the first time claimant had experienced any leg problems.⁶

Once claimant had got home he contacted his family physician and was told to come in. Claimant, however, could not get out of bed, so he had to call an ambulance and was taken to the hospital. Claimant stated that he indicated to the emergency personnel that his pain was the result of sitting in his chair at work. Claimant's family physician Dr. Larry Burnett indicated in his report that he was unsure of how claimant injured himself, but believed that a rotating or reaching action may have contributed to claimant's injury. He therefore ordered an MRI, which revealed that claimant had a disc herniation extending laterally into the right L3-4 neural foramen, status post bilateral laminectomies at the L3 and L4 levels and subligamentous disc herniation at the L4-5 level.⁷ Claimant was referred to Dr. Eustaquio Abay. Dr. Abay requested that claimant have a myelogram CT scan, but claimant received a letter denying this as respondent's workers compensation insurance would not cover it. Claimant was off work for 4 days after the accident and then returned to work.

On May 20, 2005 claimant was informed that his employment was being terminated. Claimant was offered and accepted a severance package. Claimant has not been able to work and has experienced low back and leg pain, difficulty walking, and if he sits in a chair for a length of time his legs go numb.

Following claimant's testimony and a review of the file, the ALJ offered the following comments:

THE COURT: Thank you. Well, when I read this file yesterday, I arrived at the conclusion that there had to be a defective chair to make this claim fly. Today, I don't find that we have a defective chair that causally contributed to this claim. The claimant can't recall anything about the chair that contributed to his injury that morning. He sat down at 7:40, he felt a pop at 8:10. He doesn't recall whether it

⁶ *Id.* at 17.

⁷ *Id.*, Cl. Ex. 1 (Apr. 26, 2005 MRI Report).

went down that morning, doesn't recall how the back was situated, he can't tie the quote, unquote, defective chair to his injury, nor can I.

Mr. Pistotnik [claimant's counsel] recognized that when he refocused on redirect examination on the claimant's posture at the time he was talking of leaning forward, was somehow contributory to this injury. Unfortunately, I have no medical evidence before me that that's what caused this problem. The medical record is replete with references that claimant was simply sitting in a chair and suddenly felt a pop. There's no indication that he did twist, rotate or pick anything up, but certainly a suggestion that he could have. The fact that he could have does not rise to the level of more probable than not.

In light of all the references to just sitting in a chair, in the contemporaneous medical records, and the absence of any medical testimony or medical records providing a causal relationship, the Court is unable to conclude this morning that the claimant has sustained his burden of proof of personal injury by accident arising out of his employment with respondent. For that reason, claimant's preliminary hearing requests are considered but denied.⁸

K.S.A. 2004 Supp. 44-508(d) defines "accident":

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2004 Supp. 44-508(e) defines "personal injury" and "injury":

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The foregoing statute, which defines "injury" excludes "normal activities of day-to-day living" from being found to have been caused by the employment.

The Board has concluded that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the

⁸ *Id.* at 41-43.

holdings in *Martin*⁹ and *Boeckmann*.¹⁰ The Court in *Boeckmann* distinguished cases in which “the injury was shown to be sufficiently related to a particular strain or episode of physical exertion” to support a finding of compensability.¹¹ The Board concludes that the Legislature did not intend for the “normal activities of day-to-day living” to be so broadly defined as to include injuries caused or aggravated by the strain or physical exertion of work.

Here, although the claimant complained of a “defective” chair, it does not appear that there is anything about the chair or its purported “defect” that caused the “pop” and claimant’s immediate onset of pain in his low back that radiated into his leg. Like the ALJ, the Board believes claimant has failed to establish that the chair has any connection to his injury.

Even with the attempt by his counsel to refocus the complaints on the claimant’s posture, there is absolutely no medical evidence contained within the record that would suggest that claimant’s slightly bent posture would have caused a disk to herniate. In other words, claimant was just sitting in a chair when he heard a “pop”. The Board finds no reason to disturb the ALJ’s preliminary hearing Order.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.¹²

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated August 24, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2005.

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Scott J. Mann, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁹ *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

¹⁰ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

¹¹ *Id.* at 737.

¹² K.S.A. 44-534a(a)(2).